Supreme Court, U.S.
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No. 93-1625

In The

Supreme Court of the United States

October Term, 1993

NORTH STAR ALASKA HOUSING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, and
FAIRBANKS NORTH STAR BOROUGH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT FAIRBANKS NORTH STAR BOROUGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tucker Act, 28 U.S.C. § 1346(a)(2), impliedly forbids the United States district court from taking jurisdiction over a private party's claim against the United States alleging mutual mistake of fact in the formation of a contract and seeking reformation of the contract.

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BRIEF OF RESPONDENT FAIRBANKS NORTH STAR BOROUGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Fairbanks North Star Borough ("Borough") opposes the petition for certiorari filed by North Star Alaska Housing Corporation. For the reasons set forth herein, the Borough requests the Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

1. Opinion of the Ninth Circuit three-judge panel, January 18, 1994. *North Star Alaska v. United States*, 14 F.3d 36 (9th Cir. 1994), Pet. App. 1-5.

2. Opinion of the Ninth Circuit, *en banc*, November 23, 1993. *North Star Alaska v. United States*, 9 F.3d 1430 (9th Cir. 1993), Pet. App. 6-11.

3. Oral decision of the district court, April 11, 1991. *North Star Alaska Housing Corp. v. United States*, Case No. F89-018 Civ. (Kleinfeld, J.). Pet. App. 15-19.

JURISDICTION

This jurisdiction of this Court is based upon 28 U.S.C. § 1254(1), relating to writs of certiorari to a court of appeals upon petition of a party. The petition for a writ of certiorari was filed on April 15, 1994.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

5 U.S.C. § 702 provides, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal

> authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

10 U.S.C. § 2667 provides, in pertinent part:

> (a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is –
>
> (1) under the control of the department;
>
> (2) not for the time needed for public use; and
>
> (3) not excess property, as defined by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).
>
> (b) A lease under subsection (a) –
>
> (1) may not be for more than five years, unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest;
>
> . . . .
>
> (3) must permit the Secretary to revoke the lease at any time, unless he determines that the omission of such a provision will promote the national defense or be in the public interest . . . .

10 U.S.C. § 2828(a) provides:

> (1) Subject to paragraph (2), the Secretary of the military department concerned may lease housing facilities at or near a military installation in the United States, Puerto Rico, or Guam for assignment, without rental charge, as family housing to members of the armed forces and for assignment, with fair market rental charge, as family housing to civilian employees of the Department of Defense stationed at such installation.
>
> (2) A lease may only be made under paragraph (1) if the Secretary concerned finds that there is a shortage of adequate housing at or near such military installation and that –
>
> (A) the requirement for such housing is temporary;
>
> (B) leasing would be more cost effective than construction or acquisition of new housing;
>
> (C) family housing is required for personnel attending service school academic courses on permanent change of station orders;
>
> (D) construction of family housing at such installation has been authorized by law but is not yet completed; or
>
> (E) a military construction authorization bill pending in Congress includes a request for authorization of construction of family housing at such installation.

10 U.S.C. § 2828(g) provides:

> (1) Notwithstanding any other provision of law, the Secretary of a military department, or

the Secretary of Transportation with respect to the Coast Guard, may enter into a contract for the lease of family housing units to be constructed or rehabilitated to residential use on or near a military installation with the United States under the Secretary's jurisdiction at which there is a validated deficit in family housing. Housing units leased under this subsection shall be assigned, without rental charge, as family housing to members of the armed forces who are eligible for assignment to military family housing. A contract under this section shall include a provision that the obligation of the United States to make payments under the contract in any fiscal year is subject to the availability of appropriations for that purpose.

(2) Each contract under paragraph (1) shall be awarded through the use of publicly advertised competitively bid or competitively negotiated contracting procedures. Such a contract may provide for the contractor of the housing facilities to operate and maintain such housing facilities during the term of the lease.

(3) Each contract under this subsection shall require that housing units constructed pursuant to the contract shall be constructed to Department of Defense specifications.

(4) A contract under this subsection may be for any period not in excess of 20 years (excluding the period required for construction of the housing facilities).

(5) A contract under this subsection shall provide that, upon the termination of the lease period, the United States shall have the right of first refusal to acquire all right, title, and interest

to the housing facilities constructed and leased under this contract.

(6) A contract may not be entered into for the lease of housing facilities under this subsection until –

(A) the Secretary of Defense submits to the appropriate committees of Congress, in writing, an economic analysis (based upon accepted life cycle costing procedures) which demonstrates that the proposed contract is cost effective when compared with alternative means of furnishing the same housing facilities; and

(B) a period of 21 calendar days has expired following the date on which the economic analysis is received by those committees.

(7) Each of the Secretaries concerned may enter into one or more contracts under the subsection for a number of family housing units not exceeding the number specified for that Secretary as follows:

(A) The Secretary of the Army, 6,300.

(B) The Secretary of the Navy, 6,200.

(C) The Secretary of the Air Force, 5,800.

(D) The Secretary of Transportation with respect to the Coast Guard, 900.

(8) A contract may not be entered into under this subsection after September 30, 1991.

(9) A contract for the lease of family housing under this subsection may include provision for the lease of a child care center, civic center building, and similar type buildings constructed for the support of family housing.

28 U.S.C. § 1346(a) provides, in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 . . . .

STATEMENT OF THE CASE

In 1986, petitioner and the Secretary of the Army entered into an Outlease by which petitioner leased certain land on Fort Wainwright Military Reservation, Fairbanks, Alaska. Pet. App. 7; *North Star Alaska v. United States*, 9 F.3d 1430, 1431 (9th Cir. 1993) (en banc). The lease states that 10 U.S.C. § 2667 authorizes the Secretary to enter into the Outlease for the "sole purpose of constructing, operating and leasing 400 units of residential housing." Pet. App. 7-8. The lease also provides that

petitioner is responsible for any taxes assessed against the leased property. Pet. App. 8.

Petitioner and the United States subsequently executed a second lease under former Section 801 of the Military Construction Authorization Act of 1984, 10 U.S.C. § 2828(g).[1] App. 1a. Petitioner leases back to the United States the land and several units of residential housing. Pet. App. 8. Among other things, the lease provides that

> Developer [Petitioner] shall be responsible to pay all taxes, general or special, all public rates, dues, and special assessments of every kind which shall become due and payable or which are to be assessed against or levied upon said Premises during the term of this Lease.

App. 1a. The Borough levies a real property tax on petitioner's private leasehold interest. *North Star Alaska Housing Corporation v. Fairbanks North Star Borough Board of Equalization*, 778 P.2d 1140 (Alaska 1989).

In an effort to "escape . . . the payment of taxes to the Borough," petitioner filed suit in district court, seeking to reform the Outlease to delete and replace the reference to 10 U.S.C. § 2667, which authorizes the taxation of private leaseholds on federal lands. Pet. App. 8, 21; 9 F.3d at

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[1] Section 801, former 10 U.S.C. § 2828(g), was repealed in 1991 and subsection (h) was redesignated as new subsection (g). Pub.L. No. 102-190, sec. 2806, 105 Stat. 1540 (Dec. 5, 1991). This Brief in Opposition refers to 10 U.S.C. § 2828(g) to mean the former section, as relevant to this proceeding. Since the statute which authorized the military housing has been repealed, a similar case is unlikely to arise in any jurisdiction.

1431-32; *Offutt Housing Company v. County of Sarpy*, 351 U.S. 253 (1956); *North Star, supra*, 778 P.2d at 1142-43. The Complaint alleges no violation of a federal statute or the United States Constitution. Pet. App. 21. Petitioner claims that the Secretary of the Army did not make certain findings under Section 2667, but alleges no violation of that statute. Paragraph 7 of the complaint cites to the federal act authorizing the housing, but alleges no statutory violations; it asserts only that the corporation's property will be free of local taxes if the reference to Section 2667 is removed. Pet. App. 23. The Complaint cites the Constitution only in the first paragraph, as a jurisdictional base. Pet. App. 21.

Petitioner filed the complaint in an attempt to remove its legal duty to pay real property taxes to the Borough. Pet. App. 23, 8; *North Star*, 9 F.3d at 1432. For relief, petitioner asked for equitable reformation of the Outlease to show that Section 2828 is the proper authority for the first twenty years of the lease term, and that Section 2667 is the property authority thereafter. Pet. App. 23.

The Borough was granted leave to intervene. Pet. App. 8. Both the United States and the Borough moved to dismiss for lack of subject matter jurisdiction. The district court dismissed the action on the ground that petitioner's prayer for equitable relief was contractual in nature and barred under the doctrine of sovereign immunity. Pet. App. 8, 20.

Petitioner appealed. After oral argument before a three-judge panel, the Ninth Circuit took the case en banc to resolve an intra-circuit conflict. Pet. App. 7, 12. The full

court heard argument and issued a per curiam opinion, Pet. App. 6, holding that district courts are not authorized to grant equitable relief against the United States in contract cases, although district courts have jurisdiction for claims for equitable relief which are based on statutory rights. Pet. App. 10; 9 F.3d at 1432. The court considered this court's opinion in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) and found it inapplicable because *Bowen* was not a contract case, and therefore did not address the "impliedly forbids" limitations on the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702. Pet. App. 10; 9 F.3d at 1432. The en banc panel remanded to the three-judge panel to determine whether petitioner's claim was contractually or statutorily based. Pet. App. 11; 9 F.3d at 1433.

After remand from the *en banc* panel, the three-judge panel correctly found that petitioner's claim was based on contract and that Section 702 does not waive sovereign immunity for petitioner's claim for equitable relief. Pet. App. 5.

REASONS FOR DENIAL OF THE WRIT

The decision for which review is sought is not in conflict with the decision of another United States court of appeals on the same matter. The Ninth Circuit, *en banc*, held that the Tucker Act "impliedly forbids" the district court from hearing claims against the United States which are based on a federal contract and seek equitable relief. The panel further held that equitable relief remains available in district court for claims based on statute. Pet.

App. 10; 9 F.3d at 1432. This decision is harmonious with decisions in other circuits, which have developed uniform tests for analysis of these questions. The Ninth Circuit opinion is also consistent with *Bowen v. Massachusetts*, 487 U.S. 879 (1988), because of the factual distinctions between the instant case and *Bowen*. Petitioner's Complaint for Reformation asserts a contract claim; the complaint in *Bowen* did not. The instant case involves the "impliedly forbids" language of 5 U.S.C. § 702; *Bowen* did not. The Ninth Circuit *en banc* panel recognized this distinction: "*Bowen* involved section 704 [of the APA] and was not a contract case." Pet. App. 10; 9 F.3d at 1432.

The contractual nature of petitioner's claim shows the firm distinction between the instant case and *Bowen*. In *Bowen*, the State of Massachusetts sued the Secretary of Health and Human Services ("HHS") in district court, seeking reimbursement for certain expenditures under the state's Medicaid program. The claim was based on a federal statute which required HHS to reimburse state expenditures for rehabilitative services. 487 U.S. at 886-87. HHS disallowed payment for certain services as outside the reimbursement requirements of the statute. The district court "reversed" the agency decision. 487 U.S. at 888.

The court of appeals held that there was no jurisdiction under the APA. This Court reversed, holding that although Section 702 did not waive sovereign immunity in actions for "money damages," this exclusion did not bar a claim based on an alleged misinterpretation of a statute and which sought recovery of disallowed benefits mandated by a federal statute. This Court's analysis

focused on the term "money damages" as applied to the relief available under a statutory claim. *Bowen* did not address the jurisdictional principles applicable to claims based on a federal contract.

This Court cast no doubt on the rationale of circuit court decisions which hold that Section 702 bars equitable contract claims not by its exception for "money damages," but by its exception for relief impliedly precluded by other statutes. Because *Bowen* did not involve a contract claim, the "impliedly forbids" preclusion did not apply to the Court's decision.

The Tucker Act, as pertinent, provides:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . .

28 U.S.C. § 1346(a)(2). Section 702 waives the sovereign immunity of the federal government in a variety of circumstances and provides, "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

Petitioner did not bring a claim based on a violation of a statute or the Constitution. Pet. App. 21.[2] Although the Complaint asserts that Section 2667 does not authorize the United States to enter into the Outlease, petitioner simply alleges that this is a misreference by the mistaken parties. Pet. App. 22-23. Petitioner admits that its remedy is "equitable reformation of contract." Pet. 19; *see also* Pet. App. 23.

The Ninth Circuit three-judge panel understood the careful wording of the Complaint:

> According to North Star, because the government "has not and cannot" make the findings required by the statute cited in the Outlease, "the parties were mutually mistaken in including in the Outlease the wrong statutory reference." Unless North Star is making a clearly erroneous argument about backwards-causation, its argument must be that the government's failure to comply with § 2667 is *evidence* that a different statute was intended to authorize the Outlease. The claim is not that the government is violating the law, the claim is that the government is following a different law from the one stated in the contract. This, as the district court concluded, is a contractual issue.

Pet. App. 4; 14 F.3d at 37-38, n. 2 (emphasis in original).

Thus, the Ninth Circuit did not rule that petitioner's Complaint for Reformation should be dismissed on the

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[2] There was no attempt by petitioner to show that the alleged misreference in the lease is so serious as to violate the Constitution. The Complaint cites the Constitution only as a basis for district court jurisdiction. Pet. App. 21.

sole ground that a contract appeared somewhere in the fact pattern. The Ninth Circuit, and indeed all the circuit courts which have confronted similar questions, looked past superficialities to find the essence of the claim. The jurisdictional issue turns on "the source of the rights upon which the plaintiff bases its claims and the type of relief sought (or appropriate)." Pet. App. 3; 14 F.3d at 37, quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

> If a plaintiff's claim is "concerned solely with rights created within the contractual relationship and has nothing to do with duties arising independently of the contract . . . [the] contract is 'founded . . . upon [a] . . . contract with the United States' and is therefore within the Tucker Act and subject to its restrictions on relief."

Pet. App. 2-3; 14 F.3d at 37. The source of petitioner's rights is contractual, as the parties are said to be mutually mistaken about the contract terms; the relief is contractual, as petitioner seeks reformation.[3] The Tucker Act impliedly forbids the relief which petitioner seeks.

The "source of the rights and type of relief" test has developed into a standard uniformly applied by the circuits. *E.g., Megapulse*, 672 F.2d at 968; *Katz v. Cisneros*, 16 F.3d 1204, 1209 (Fed.Cir. 1994); *Region 8 Forest Serv. Timber Purchasers v. Block*, 993 F.2d 800, 807 (11th Cir. 1993); *Amoco Production Co. v. Hodel*, 815 F.2d 352, 362 (5th Cir.

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[3] The equitable remedy of reformation is appropriate "[i]f, by reason of mistake of law, the legal effect of the words in which a contract or conveyance is expressed is different from that on which the parties were agreed. Pet. App. 3; 14 F.3d at 37, quoting 3 Corbin on Contracts § 614 (1960).

1987) ("essence of the claim"); *Eagle-Picher Industries, Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990). The courts of appeals have not used this standard to arbitrarily expand the jurisdiction of the district court, nor has the Federal Circuit used this test to expand the jurisdiction of the Court of Federal Claims.

Petitioner appears to argue that because the contract/statute distinction does not appear in the literal language of the Tucker Act, this case is sufficiently important to prompt a hearing on the meaning and extent of this distinction. Pet. 15-19. The cases cited by petitioner, including *Bowen*, expressly recognize and apply the distinction between claims based on contract and those based on statute. The instant case does not present a close question of the source of the petitioner's claim nor of the relief requested. There is no compelling reason why this traditional contract case involving a reference in a lease to a subsequently repealed statute should be the vehicle by which decades of federal law is revisited.

The "source of the rights and type of relief" test is also harmonious with *Bowen*. *Bowen* distinguished claims for money damages, a contractual concept, and claims based on statutory mandates, which have the purpose of obtaining entitlements. *Bowen*, 487 U.S. at 891-901. In *Bowen*, the State did not seek "money in *compensation* for the damages sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself. . . . " 487 U.S. at 900 (emphasis in original). Thus, *Bowen*'s analysis paralleled

that of the circuits, recognizing jurisdiction based on the source of the rights and the type of relief sought.

Following *Bowen*, at least four courts of appeals have rejected contentions that equitable claims for contract relief may now be asserted in district court. "*Bowen* was not an action for breach of contract. It was a suit to review agency action which was claimed to be contrary to federal law." *Coggeshall Development Corp. v. Diamond*, 884 F.2d 1, 5 (1st Cir. 1989). "The only remedy to which the United States has consented in cases of breach of contract is to *the payment of money* damages. . . . We are unaware of any waiver of sovereign immunity by the United States as to specific performance for breach of contract." 884 F.2d at 3 (citations omitted, emphasis in original).

The Seventh Circuit held that Section 702 "largely waives the sovereign immunity of the United States in equitable cases," citing *Bowen*, but relief on a contract is precluded by the Tucker Act "which assigns to the Claims Court all actions seeking equitable relief based on a contract with the United States." *Wabash Valley Power v. Rural Electrification Admin.*, 903 F.2d 445, 452 (7th Cir. 1990).

In *Eagle-Picher Industries, Inc. v. United States*, 901 F.2d 1530, 1532, n. 1 (10th Cir. 1990) the Tenth Circuit stated "[u]nlike cases discussed above and the present action . . . the claim in *Bowen* did not relate to a government contract. . . . Such cases must be filed in the Claims Court."

The District of Columbia Circuit reaffirmed the distinction between contract and statutory claims. *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598 (D.C. Cir. 1992). In *Transohio*, the bank sued a federal agency for specific

relief and rescission of a contract; some of the issues in the case involved jurisdiction over the various types of claims. The circuit court reviewed the ruling in *Bowen*, as well as the earlier cases on this same point. The court did not alter its earlier rulings on jurisdiction over statutory and contractual claims, because, among other things, "*Bowen* did not involve a contract and it did not address the 'impliedly forbids' limitation on the APA's waiver of sovereign immunity." 967 F.2d at 613.

Transohio contains an extensive, detailed, and thoughtful discussion of the legislative history behind the 1976 amendments to the Tucker Act, which added the "impliedly forbids" language to Section 702, and the judicial developments since that time. The *Transohio* court took care not to give an overly expansive reading to the term "founded upon" a contract. 967 F.2d at 611. The District of Columbia Circuit concluded:

> [Section] 702 of the APA does not waive sovereign immunity for contract actions against the government. Section 702 "is by its terms inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' and the Tucker Act and Little Tucker Act impliedly forbid such relief." Under the cases, the Tucker Act impliedly forbids – in APA terms – not only district court awards of money damages, which the Claims Court may grant, but also injunctive relief, which the Claims Court may not.

967 F.2d at 609 (citations omitted). *Transohio* permitted the statutory claims to go forward in district court, and dismissed the contract claims.

Despite the characterizations of petitioner, *Katz v. Cisneros*, 16 F.3d 1204 (Fed.Cir. 1994), does not create a conflict among the circuits, because the Federal Circuit ultimately ruled that the plaintiff had no contract at all with a federal agency. In *Katz*, a developer had an agreement with the Housing Alliance, a private not-for-profit corporation, for the construction of certain housing for low-income persons. The developer brought suit in district court to challenge the method of calculating rents, and named as defendants the Housing Alliance and the U.S. Department of Housing and Urban Development. The district court dismissed based on the Tucker Act, and transferred the case to the Federal Circuit. The Federal Circuit discussed the Tucker Act and *Bowen*, and ultimately found that the plaintiff housing developer had no contract with a federal agency, but only with a private party. 16 F.3d at 1210.

The *Katz* court's discussion of the Tucker Act does not represent a departure from other circuits. *Katz* recognized the same "source of the rights" test, citing *Transohio*, 16 F.3d at 1209. Further, *Katz* applied fundamentally the same rule as the other circuits: when characterizing a claim, the mere fact that a contract or a statute is involved does not mechanically steer the claim to claims court or district court. *Katz* analyzed the source of the rights and the type of relief sought, and found that the developer sought no more than that provided by statute. 16 F.3d at 1208 ("it is a suit seeking to enforce the statutory mandate itself"). The *Katz* complaint requested prospective relief. 16 F.3d at 1209. The Federal Circuit, as all other circuits considering similar cases, examined the fact that a contract was involved, but ruled that the claims were

statutory and that equitable relief was thus available in district court. This result is consistent with *Bowen*.

This line of cases from five circuits shows that when the "impliedly forbids" language is squarely before the reviewing court on a contract with a federal agency, each court has concluded that Section 702 grants no waiver of sovereign immunity under the Tucker Act as to contract claims, but does so as to statutory claims. This line is consistent with *Bowen*'s ruling that the statutory claims in that case may be heard in district court. The circuits treat the jurisdictional issue consistently; there is no conflict for this Court to resolve.

CONCLUSION

The Fairbanks North Star Borough prays that the United States Supreme Court deny the petition for certiorari filed by the North Star Alaska Housing Corporation.

Respectfully submitted,

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May 1994

APPENDIX

LEASE NO. DACA85-5-88-17
BETWEEN
THE UNITED STATES OF AMERICA
AND
NORTH STAR ALASKA HOUSING CORPORATION

THIS LEASE is made and entered into as of the *6th* day of *November*, 1987, by and between NORTH STAR ALASKA HOUSING CORPORATION (hereinafter referred to as "Developer") and the United States of America represented by the U.S. ARMY ENGINEER DISTRICT, ALASKA (hereinafter referred to as "Government") by virtue of the authority contained in Title 10, United States Code 2828, as amended by Section 801 of Public Law 98-115.

. . .

ARTICLE VI

UTILITIES, RATES, CHARGES, TAXES AND ASSESSMENTS

The Government shall pay all rates and charges which may become payable for water, sewer, gas, electric current, oil or other forms of power, fuel, or utility used or utilized by the Government on the leased Premises during the full term of this Lease. Determination of such charges shall be substantiated by metering or submetering. Developer shall be responsible to pay all taxes, general or special, all public rates, dues, and special assessments of every kind which shall become due and payable or which are to be assessed against or levied upon said Premises during the term of this Lease. The

Developer will allow the Government to deduct and retain out of any rent of said Premises all such sum and sums of money as the Government shall pay on account of such rates, taxes, and assessments, whether the same shall or shall not have accrued, and become payable for or in the respect of the same period out of which the same shall be deducted provided the Government shall give written notice of its intent to so act to the Developer at least thirty (30) days prior to any such payment.

The Developer shall furnish the Government copies of all notices and tax bills which may affect the evaluation of the Premises for general real estate tax purposes or which may affect the levy or assessment of general real estate taxes thereon. Such notices and tax bills shall be delivered or mailed within three (3) days from the receipt thereof by the Developer to the Government's designated representative. The Developer shall cause payment of said general real estate taxes to be made under protest when requested to do so by the Government. The Government may contest the amount or validity of any valuation for general real estate tax purposes or of any levy or assessment of any general real estate taxes by appropriate legal proceedings, either in the name of the Government or the name of the Developer or in the names of both. The Developer, upon reasonable notice and request by the Government, shall join in any such proceedings, but the Developer shall not be subject to any liability for the payment of penalties, costs, or expenses in connection with any proceedings brought by the Government. The Developer shall cooperate with the Government in any such contest or proceeding and execute any documents or

pleadings required for such purpose, provided the Developer shall reasonably be satisfied that the facts and data set forth in such documents or pleadings are accurate.

In addition, if the total general real estate taxes levied during a lease year exceed the total general real estate taxes levied during the second lease year, the increase for that year shall be increased by 80% of the excess and reimbursed by the Government. The amount of increase shall be prorated for each housing unit. General real estate taxes are taxes which are assigned on an *ad valorem* basis, against all taxable real property in the taxing authority's jurisdiction without regard to benefit to the property, for the purpose of funding general governmental services. The term "general real estate taxes" shall exclude any fine, interest, or penalty for nonpayment but shall include any discount offered for prompt payment whether or not the Developer has taken advantage thereof. This increase shall occur only after submission by the Developer of copies of the tax bills, receipts (or other documentary evidence of payment), and a correctly calculated invoice.

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